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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1916

Delilah B. Blanks,

Petitioner,

v.

Wilbur Register, Chairman of the Bladen County Social Services Board, and Grady Peterson, George Resseguie, Michael R. Simmons, and Carl Suggs, Members of the Bladen County Social Services Board,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

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INDEX

	Page
Table of Citations	ii
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Argument	7
Conclusion	17
Appendix	19
Opinion of the United States Court of Appeals for the Fourth Circuit	19
Memorandum Opinion of the United States District Court for the Eastern District of North Carolina	26

TABLE OF CITATIONS

	Page
CASES:	
Adickes v. Kress & Company, 398 U.S. 144 (1970)	8-9
Barnett v. Wells Fargo Nevada National Bank of San Francisco, 270 U.S. 438 (1926)	15
City Bank Farmers Company v. Schnader, 291 U.S. 24 (1934)	14
Davis v. Washington, 352 F.Supp. 187 (D.C. D.C. 1972)	12
DeFunis v. Odegaard, 42 U.S.L.W. 4578 (1974)	12
Douglas v. City of Jeannette, 319 U.S. 157 (1943)	15
Galliher v. Caldwell, 145 U.S. 368 (1892)	15
Hailes v. United Airlines, 464 F.2d 1006 (5th Cir. 1972)	11
Hammond v. Hopkins, 143 U.S. 224 (1892)	14
McDonnell Douglas Corporation v. Green, 41 U.S.L.W. 4651 (1973)	13
Mount v. Grand International Brotherhood of Locomotive Engineers, 226 F.2d 604 (6th Cir. 1955)	14
Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969)	11

Swift and Company v. United States, 276 U.S. 311 (1928) 15

STATUTES:

28 U.S.C. 1254(1) 2
28 U.S.C. 1343(3)(4) 2

42 U.S.C. 1983 2-3, 8, 10, 12, 13, 17
42 U.S.C. 2000e 10, 12, 17
42 U.S.C. 2000e(f) 16
42 U.S.C. 2000e-2(a)(1) 12-13
42 U.S.C. 2000e-5 5

North Carolina General Statutes 108-17(a) 16
North Carolina General Statutes 108-19 16
North Carolina General Statutes 126-1 16

MISCELLANEOUS:

Corbin, Contracts, 946 Sec. 961 (1 Vol. ed. 1952) 14
House Report No. 92-238, 2 U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess. 2137, 2154 (1972) 12, 16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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The petitioner, Delilah B. Blanks, prays that a writ of certiorari issue to review the judgment made by the United States Court of Appeals for the Fourth Circuit, entered March 26, 1974, affirming the judgment of the United States District Court for the Eastern District of North Carolina, and dismissing petitioner's complaint.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit,

and the United States District Court for the Eastern District of North Carolina, in this case are not yet reported. Copies of these opinions are appended to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction of the District Court was based on 42 U.S.C. 1983 and 28 U.S.C. 1343(3), (4).

QUESTION PRESENTED

Where a position of public employment is held open for an extraordinarily long period of time, while a Negro's application is pending and has not been acted upon, and the applicant believes that the position is being withheld on account of race and sex, is an action brought to enforce the applicant's rights to the position premature and not ripe for adjudication?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1983

If a person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Plaintiff in her complaint sought an injunction mandating her appointment to the position of Director of Social Services of Bladen County.

Plaintiff had worked full time with the Bladen County Department of Social Services for approximately four years to July, 1971, when the Department granted her a year's leave of absence to allow her to secure a Master's degree in social work. As of March 1, 1972, the Director of Social Services of Bladen County resigned. Plaintiff promptly applied for this position. She was highly qualified for the job, having attained a State Department of Social Services rating of 80.00 as a "County Director, Social Services I," and possessing a Master's degree in social services with a superior academic average, together with substantial practical experience. There is no suggestion in the record that plaintiff is in any way unqualified to fill the position of Director of Social Services.

Instead of hiring plaintiff as Director, defendants made a temporary appointment of another individual as acting director. The acting director

did not possess the necessary qualifications and could not be appointed as Director.

Plaintiff is a Negro and a female. The acting director was a white female, and was a niece of one of the defendant members of the Bladen County Social Services Board. Defendants did extensive advertising in various newspapers, and engaged in personal solicitation at various locations outside North Carolina, seeking a new Director of Social Services. At some time in April or May, 1972, defendants tentatively offered the directorship to a Mr. Davis, a white male, but he could not pass the state tests necessary for the appointment. Defendants interviewed and considered for employment as permanent Director several other white males, but these individuals either did not desire the position or were not qualified for it.

This action was dismissed on May 11, 1973. On May 14, 1973, defendants voted to employ Charles Prince, a white male, as permanent Director of Social Services. Mr. Prince accepted and is presently serving in this position.

Following the order of dismissal, and upon learning of the employment arrangement made by defendants with Mr. Prince, plaintiff moved the District Court for injunction pending appeal for the restraint of defendants from entering into a formal and complete employment relationship with the new Director. The Court denied this motion by order entered

June 1, 1973.

The District Court's explanation of the decision to dismiss this action was:

> In demanding that she be appointed as Director of Social Services, plaintiff seeks to become defendants' chief executive officer--the person through whom defendants must implement their policies and discharge their statutory duties. To say that they must appoint the first Negro to apply for this position, although professionally qualified, or risk a suit for damages such as this one strikes the Court as a reductio ad absurdum in civil rights litigation. (Infra, p. 30).

The District Court stated that its dismissal of the action amounted to a summary judgment for defendants, citing Rule 12(b) of the Federal Rules of Civil Procedure. A review of the record indicates that the Court did not comply with the provision of Rule 12(b) that "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56," because the Court's discussion with counsel at oral argument regarding summary judgment disposition, was limited to the issue of whether plaintiff had exhausted her administrative remedies with the Equal Employment Opportunity Commission, pursuant to 42 U.S.C. 2000e-5. (Transcript of Motion Hearing, pp. 17-18).

The Court of Appeals clearly was in error when it stated that the District Court had indicated that the motion under Rule 12(b) would be treated as one for summary judgment. (Infra, pp. 21, 22-23). Accordingly, the Court of Appeals was wrong in refusing to consider plaintiff's affidavits filed in that Court, for the purpose of showing the evidence that plaintiff could have offered on a summary judgment hearing reaching the merits of the case, if she had been given that opportunity. This evidence included a reported statement concerning plaintiff's application by defendant Wilbur Register that, "I don't think the County is ready for a Negro to head up a major agency;" and that defendants, while plaintiff's application was pending, had tentatively offered the position to a white male who could not pass the required state tests; that several other white males were considered for the position by defendants, but these individuals either did not want it or were not qualified for it; and that a white male was appointed to the position on May 14, 1973, three days after the District Court's judgment of dismissal, with whom there had been considerable communication over the preceding several months.

The Court of Appeals affirmed the District Court's decision on the theory that plaintiff's action was premature, in that another person had not been chosen to fill the permanent position before the date on which she

filed her action in court. (Infra, pp. 24-25).

ARGUMENT

AN ACTION BROUGHT TO ENFORCE THE APPLICANT'S RIGHTS TO THE POSITION IS MATURE AND RIPE FOR ADJUDICATION WHEN A POSITION OF PUBLIC EMPLOYMENT IS HELD OPEN FOR AN EXTRAORDINARILY LONG PERIOD OF TIME, WHILE A NEGRO'S APPLICATION IS PENDING AND HAS NOT BEEN ACTED UPON, AND THE APPLICANT BELIEVES THAT THE POSITION IS BEING WITHHELD ON ACCOUNT OF RACE AND SEX.

Plaintiff, eminently qualified for the position, applied to be Director of Social Services of Bladen County promptly after this position became vacant on March 1, 1972. No action was taken on plaintiff's application for more than 14 months. Instead of hiring plaintiff, who is a Negro, to be the Director, the Board made a temporary appointment of a white female, a niece of one of its members, as acting director. The acting director did not possess the necessary qualifications and could not be made permanent. While plaintiff's application was pending, defendants advertised and solicited far and wide to find a permanent Director. They made a tentative offer sometime during April or May, 1972, to a white male, but he could not pass the necessary state tests. They interviewed and considered for the position several other white males, but these individuals either did not desire the position or

were not qualified for it. Three days after the District Court dismissed this action, another white male was given the appointment.

This action was commenced on November 14, 1972, after plaintiff's application had been pending with the Social Services Board for eight months. Defendants in their motion and brief in District Court, as late as March 20, 1973, represented that they were still considering plaintiff's application.

The Court of Appeals accepted these representations as proven, and as binding on the Court. The Court of Appeals, accordingly, was of the opinion that plaintiff's action was premature and not ripe for adjudication.

This decision by the Court of Appeals is in conflict with the applicable decisions of this Court. Adickes v. Kress & Co., 398 U.S. 144 (1970), makes it clear that summary judgment for defendants was improper in the present case. That case also was an action under 42 U.S.C. 1983; there Adickes alleged that Kress & Company employees conspired with city policemen to deprive plaintiff of her right to enjoy equal service in a place of public accommodation. By deposition and affidavits, store personnel and policemen had denied any conspiracy. Adickes in her deposition said she had no knowledge of conspiratorial communications. All Adickes was able to show to support her conspiracy theory was that there was a policeman in the store

at the time of the refusal to serve her and that this officer subsequently arrested her. The Court held that Kress & Company had not carried its burden on the motion for summary judgment, because of its failure to foreclose the possibility that there was a policeman in the store who reached an understanding with some employee that Adickes not be served. 398 U.S. at 157.

Likewise, in the present case, defendants were not entitled to summary judgment because they did not foreclose the possibility that they were not considering plaintiff's application in good faith and free from racial prejudice. The facts before the District Judge, even at the time of the unanticipated summary judgment decision, indicate that defendants' inaction on plaintiff's employment application was on account of her race. A white female, unqualified for the directorship, was appointed temporary acting director. The acting directorship was not offered to plaintiff, who was fully qualified for the permanent position. The eight months of inaction on the application before plaintiff filed her lawsuit, in and of itself, was strong evidence that defendants were not giving an honest consideration to plaintiff's application. If there had been some reason why defendants did not want to employ plaintiff other than race, defendants surely would have rejected her application in timely fashion. There is an inescapable inference that by

dragging their feet defendants hoped plaintiff would seek other employment, and that they would be faced neither with a discrimination charge or an unwanted Negro employee.

In any event, it was erroneous on procedural grounds to grant summary judgment in this case. Rule 12(b) requires that when a motion to dismiss is treated as one for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." The District Court's invitation to treat the motion for dismissal as one for summary judgment, clearly extended only to defendants' contention that there had been a failure to exhaust remedies before the Equal Employment Opportunity Commission, so that a cause of action under 42 U.S.C. 2000e was not stated. There was no intimation by the Court that the cause of action under 42 U.S.C. 1983 would be subjected to summary judgment treatment. The Court of Appeals plainly read the record wrong in holding otherwise.

Regarding defendants' motion properly as one made under Rule 12(b)(6), it is abundantly clear that the case should not have been dismissed. Plaintiff alleged in her complaint that defendants' refusal to appoint her as Director of Social Services amounted to the failure and refusal to hire an individual because of her race, color, and sex. Such allegations cannot be

dismissed for failure to state a cause of action. Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969); Hailes v. United Airlines, 464 F.2d 1006 (5th Cir. 1972). Plaintiff supplemented the record when before the Court of Appeals, for the purpose of showing, not only that facts conceivably could be offered in evidence to support the claim, but that there were specific facts in this case available to plaintiff that would have been made a part of the record if the District Court had given fair warning that the matter was to be considered on summary judgment. For this purpose, plaintiff showed that during April or May, 1972, the directorship was tentatively offered to a white male, who could not pass the necessary state tests; that defendants interviewed and considered for the position several other white males, but these individuals either did not desire the position or were not qualified for it; that defendants advertised and solicited extensively in several states searching for a new Director of Social Services; that Charles Prince was appointed to the position on May 14, 1973, three days after the District Court's judgment of dismissal, and that defendants had been in previous contact with Mr. Prince for a considerable period of time; and that defendant Wilbur Register had said in reference to plaintiff's application, "I don't think the County is ready for a Negro to head up a major agency,"--all while plaintiff's applica-

tion for the job was pending and not acted upon. For the purpose of determining the ripeness of this case for adjudication, these matters presented to the appellate court ought to be taken into account. DeFunis v. Odegaard, 42 U.S.L.W. 4578 (1974).

Regardless of whether the record is viewed as a summary judgment case, which the Court of Appeals did, or as one involving a dismissal for failure to state a claim, the decision below should be reversed, and plaintiff given her day in court. The basic question in either case is whether a Negro applicant for public employment possesses a mature and justiciable claim, when the application goes ignored for many months and the position remains temporarily filled by an unqualified Caucasian. If the federal civil rights laws are to have any efficacy, this question must be answered affirmatively.

While this action is based on 42 U.S.C. 1983, a court in applying that section should look to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, for guidance as to constitutional constraints on public employers charged with racial discrimination. Davis v. Washington, 352 F.Supp. 187 (D.C. D.C. 1972); House Report No. 92-238, 2 U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess. 2137, 2154 (1972). It is unlawful discrimination for an employer "to fail . . . to hire . . . any individual . . . because of such

individual's race, color, . . . sex, . . ." 42 U.S.C. 2000e--2(a)(1). The failure to hire is an act of discrimination against which the prospective employee is entitled to relief under the Act. The activities of public employers, therefore, should be subjected to similar constraints under 42 U.S.C. 1983.

Defendants' failure to hire plaintiff, who was amply qualified for the position, for a period of many months while her application was pending, was in violation of the civil rights laws. These facts alone make out a prima facie case, that will take plaintiff past the point of summary judgment. A prima facie case of racially discriminatory denial of employment is made out "by showing (i) that [she] belongs to a racial minority; (ii) that [she] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [her] qualifications, [she] was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas Corporation v. Green, 41 U.S.L.W. 4651 (1973).

The Court of Appeals' decision that the present case is not ripe for adjudication, is at odds with the congressional purpose to grant relief for refusing to hire members of minority races, and is inconsistent with

decisions of this Court and other accepted authorities. A suit for an injunction will not be dismissed as prematurely filed, where the occurrence complained of is sufficiently imminent and certain to justify equitable intervention. City Bank Farmers Co. v. Schnader, 291 U.S. 24 (1934). In the present case, from hindsight we learn that a white male was employed in this position three days after the judgment of dismissal, so that plaintiff's apprehensions of existing and continuing racial discrimination are borne out by events. See Mount v. Grand International Brotherhood of Locomotive Engineers, 226 F.2d 604 (6th Cir. 1955), where it was held that the fact that a proposed contract with a railroad alleged to discriminate arbitrarily against certain members of a union had not been executed, did not render premature a suit to enjoin its consummation. The present type of case is analogous to the classical suit for anticipatory breach of contract, where equitable remedies are available. Corbin, Contracts, 946 Sec. 961 (1 Vol. ed. 1952).

Had plaintiff not filed her action when she did, and instead until her application had been pending 14 months and the new permanent Director was hired, she might well have lost her right to an injunction mandating her appointment. Equity aids the vigilant, not those who slumber on their rights. Hammond v. Hopkins, 143 U.S. 224 (1892). If, in

addition to lapse of time, the delay has worked such prejudice to the rights of other persons adversely affected, enforcement of the rights asserted is considered to be inequitable, and relief will be denied. Barnett v. Wells Fargo Nevada National Bank of San Francisco, 270 U.S. 438 (1926). In this context the doctrine of laches would be applied to protect the rights of the newly appointed employee, if he were innocent of any collusion in the discriminatory denial of employment to plaintiff. Galliher v. Cadwell, 145 U.S. 368 (1892). If the position plaintiff sought had been filled at the time the action was commenced, injunctive relief may not have been available, by application of the principle that an injunction is not to afford a remedy for what is past but to prevent future mischief, so that rights already lost and wrongs already perpetrated cannot be corrected by injunction. Swift & Company v. United States, 276 U.S. 311 (1928); Douglas v. City of Jeannette, 319 U.S. 157 (1943).

The District Court suggested, and defendants have contended, that plaintiff has no remedies under the civil rights laws because she "seeks to become defendants' chief executive officer --the person through whom defendants must implement their policies and discharge their own statutory duties." (Infra, p. 30). It is clearly the will of Congress that the civil rights

laws be invoked to bring an end to the denial of administrative, executive, and managerial positions to minority members. The House Report on the 1972 amendment to Title VII, extending coverage to government employees, refers to a need to correct "de facto segregated job ladders," and cites reports by the United States Commission on Civil Rights finding that in several area studies Negros constituted over 70% of the common laborers employed by state and local governments, but that most white collar jobs were largely inaccessible to minority persons. "For example, in Atlanta and Baton Rouge, there were no blacks in city managerial positions." House Report No. 92-238, supra, at 2152. None of the exceptions of public employees from coverage under Title VII fits the position for which plaintiff applied. (The exceptions are for (1) elected officers, (2) members of an elected officer's personal staff, (3) appointees on policy-making levels, who are not at the same time subject to civil service laws, and (4) immediate advisors of elected officers with respect to the exercise of the constitutional or legal powers of the office, who are not at the same time subject to civil service laws. 42 U.S.C. 2000e(f). County directors of social services in North Carolina have no policy-making powers, and are covered by civil service laws. N.C.G.S. 108-19; 108-17(a); and 126-1.)

As was pointed out above, the pro-

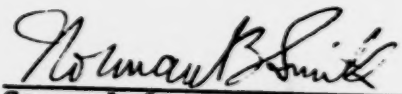
hibitions against discrimination in public employment arising out of 42 U.S.C. 1983, are to be applied consistently with those of Title VII, 42 U.S.C. 2000e. It is clear that administrative and managerial positions in general, and the position of Director of Social Services of Bladen County, are covered by 42 U.S.C. 1983.

It may be that where there is only one position to be filled, and that is an important one, equitable remedies on behalf of a minority applicant ought to be applied somewhat differently than they would in the instance of a semi-skilled position with frequent openings. Nevertheless, the law requires a Negro applicant to one of the preferred positions of employment, which plaintiff sought, be entitled to have the application treated honestly, in good faith, without extraordinary delays, and altogether free from racial prejudice. Plaintiff has been denied these fundamental considerations by the Bladen County Board of Social Services, the District Court, and the Court of Appeals, and for that reason she applies to this Court for a petition for writ of certiorari.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this

petition for writ of certiorari should be granted.



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APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 73-1873

DELILAH B. BLANKS

Appellant

v.

WILBUR REGISTER, et al

Appellees

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. F. T. Dupree, Jr., District Judge.

Argued December 3, 1973
Decided: March 26, 1974

Before Haynsworth, Chief Judge, and Boreman, Senior Circuit Judge, and Widener, Circuit Judge.

Norman B. Smith (Smith, Carrington, Patterson, Follin & Curtis, on brief) for Appellant; David A. Nash (William L. Hill, II, Hogue, Hill & Jones, on brief) for Appellees.

WIDENER, Circuit Judge:

This civil rights action was brought by Mrs. Delilah Blanks, a Negro female, who sought injunctive relief, including back pay, from the defendant members of the Bladen County, North Carolina Social Services Board. She alleged that the defendants violated 42 USC § 1981, § 1983, and § 2000e-2(a)(1) in failing to appoint her, on account of her race, as Director of Social Services. The defendants filed a verified motion to dismiss under FRCP 12(b)(6) for failure to state a claim, averring, which was not denied, among other things, that Mrs. Blanks was still being considered for the position as Director of Social Services, the position still being vacant at that time.

The district court treated the motion to dismiss as one for summary judgment under FRCP 56, and dismissed the case, holding that the action was premature. Mrs. Blanks complains on appeal that she had no notice the court would treat the motion as one for summary judgment. Because it is clear from the record that the court did indicate its intent to treat the motion as one for summary judgment, and the suit was obviously premature, we affirm.

Mrs. Blanks had been employed by the Bladen County Social Services Board (Board) since 1968, and was granted a one year leave of absence in July, 1971, in order to secure her masters degree in

social services. The director of the Board submitted his resignation to be effective on February 29, 1972. On February 8, 1972, Mrs. Julia Butler, the highest ranking employee in terms of grade and service, was appointed acting director to serve until a permanent director could be appointed. By letter dated February 9, 1972, Mrs. Blanks applied for the position. When this letter was received by the Board the record does not show, so we presume a day or so thereafter. Mrs. Blanks had her job interview with the Board May 22, 1972.

Mrs. Blanks filed this suit on November 14, 1972, at which time a permanent director had not been appointed. The essence of her complaint was that she was a qualified black person and therefore should be appointed. The Board filed its verified answer and motion to dismiss under FRCP 12(b)(6) on December 5, 1972, noting that plaintiff had not been rejected as an applicant and her application was still being considered along with a number of other applicants. This condition remained when Mrs. Blanks filed her unverified response to the motion to dismiss on March 14, 1973. Hearing on defendants' motion was held on April 9, 1973, at which time the court indicated that the FRCP 12(b)(6) motion would be treated as one for summary judgment in accordance with FRCP 56. The memorandum opinion granting summary judgment was issued on

May 11, 1973, as was the order dismissing the case. The Board, until after that date, had not appointed a permanent director, Mrs. Butler's temporary appointment having been extended.

On May 31, 1973, the plaintiff filed her notice of appeal and motion for an injunction pending appeal, which motion was denied by order entered June 1, 1973. For the first time, in the unverified motion for an injunction pending appeal, it was brought to the attention of the district court that, on May 14, 1973, a certain Prince had been appointed as Director of Social Services for the county. In that motion, the plaintiff stated, not supported by affidavit or evidence, that the Board had tentatively agreed to employ Prince sometime during the winter of 1972-73, and that the statement of the Board, in its answer, that the plaintiff was under consideration was "not accurate." Plaintiff, as she could have, made no motion under Rule 59 FRCP to alter or amend the judgment, and no motion under Rule 60 FRCP for relief from the judgment. Rather, she chose to prosecute her appeal on the record submitted to the district court.

Mrs. Blanks now contends that she had insufficient notice of the court's intention to treat the FRCP 12(b)(6) motion as one for summary judgment under Rule 56. We are of opinion the point

is not well taken. As stated before, the court indicated, on April 9th, at the hearing on the motion, its intention to treat the motion as one for summary judgment, and the matter of filing affidavits was discussed at length at that time. The defendants did file an affidavit on April 17, but the plaintiff filed none until August 28, 1973, with her appellate brief in this court, more than three months after the decision of the district court. The "reasonable opportunity to present new material" required by Rule 12(b)(6) is satisfied where the court has made plain its intention to both parties and where one party has acted, and the other not acted, in accordance with the court's request for affidavits outside the pleadings. See Dale v. Hahn, 440 F.2d 633, 638 (2nd Cir. 1971). Cf. Johnson v. R.A.C. Corporation, ___ F.2d ___ No. 73-1958 (4th Cir. 1974), in which case the district court did not indicate to the parties that it was treating the 12(b)(6) motion as one for summary judgment.

The argument on the motion was quite detailed and full opportunity was granted the parties to be heard. 87 pages of transcript are devoted to it. The defendants' position was there stated: "But at this stage nobody has been hired and I don't think you can have a lawsuit. There's no controversy about it."

Following plaintiff's filing of affidavits in this court with her appellate brief, defendants filed affidavits here. Both sets of affidavits deal largely with the merits of the question as to whether or not plaintiff should have received the sought-for appointment. Since none of them were ever seen by the district court, much less considered, we do not consider them here but leave such matters as they may assert for another day. "Our adjudication of the merits of such a challenge will await that time." Socialist Labor Party v. Gilligan, 406 U.S. 583, 589 (1972).

In short, this suit was brought by a plaintiff who applied for a top-level supervisory job, was in fact considered for the position, and then, before the Board had acted in making any appointment, sued, alleging unlawful discrimination because the Board had not appointed her. It is obvious that Mrs. Blanks had not become deprived of any right at the time of the filing of this suit and at the time the case was decided by the district court, because the Board had neither rejected her application nor appointed anyone else to the position. We are of opinion that no justiciable case or controversy under Article III of the Constitution had been presented until the Board had at least done some act or made some omission concerning Mrs. Blanks which affected her in some

way. The case was premature and therefore not ripe for judicial determination. Any opinion a federal court might have given on the merits would have been a forbidden, advisory one.[1]

APPEAL DISMISSED.

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1. Beard v. Stahr, 370 U.S. 41 (1962); Stearns v. Wood, 236 U.S. 75 (1915); Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972); Eccles v. Peoples Bank, 333 U.S. 426 (1948); A & P Tea Company v. Grosjean, 301 U.S. 412, 429 (1937).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

DELILAH B. BLANKS, Plaintiff,	)	CIVIL NO. 1610
v.	)	MEMORANDUM OF DECISION
WILBUR REGISTER, Chairman of the Bladen County Social Services Board, and GRADY PETERSON, GEORGE RESSEGUIE, MICHAEL R. SIMMONS and CARL SUGGS, Members of the Bladen County Social Services Board, Defendants.	)	

In this civil rights action the plaintiff, a Negro female, seeks injunctive relief including back pay from the defendants, who are the chairman and members of the Bladen County (North Carolina) Social Services Board, upon allegations that the defendants in failing to appoint the plaintiff as Director of Social Services of Bladen County have violated the provisions of 42 U.S.C. §§ 1981, 1983 and 2000e-2(a)(1). The case is before the court on defendants' motion to dismiss for failure of the complaint to state a claim upon

which relief can be granted, the motion being supported by an affidavit in which defendants aver that the position sought by the plaintiff remains unfilled; that plaintiff is being considered along with other applicants for the position; that the defendants did not have in their employment as many as twenty-five persons necessary to make applicable the provisions of 42 U.S.C. § 2000e-2(a)(1) at the time of the alleged discriminatory action of defendants; and that defendants do not use racially discriminatory employment practices as evidenced by the fact that a significant number of defendants' present employees are Negroes. The motion will be treated as one for summary judgment. Rule 12 (b), R.R.C.P.

In addition to her individual claims plaintiff seeks in her complaint to maintain the action as a class action under Rule 23, but on oral argument her counsel has indicated that he would not resist defendants' motion that the action not be allowed to proceed as a class action. Accordingly, it will be considered only on the basis of plaintiff's individual claim.

Plaintiff alleges that she was an employee of the Bladen County Department of Social Services for approximately four years prior to July, 1971, at which time she was granted a year's leave of absence to allow her to secure a master's degree in social work. When

the Director of Social Services of Bladen County resigned as of March 1, 1972, plaintiff promptly applied for the position. She alleges that she is "highly qualified for the job, having attained a State Department of Social Services rating of 80.00 as a 'County Director, Social Services I', and possing a master's degree in social services with a superior academic average together with substantial practical experience."

She further alleges that defendants failed and refused to hire her for the position of Director of Social Services but instead made a temporary appointment of another person as Acting Director and that "the Acting Director does not possess the necessary qualifications, and cannot and will not be appointed as Director".

Plaintiff then alleges that

> "Defendants' refusal to appoint plaintiff as Director of Social Services of Bladen County consists of the failure and refusal to hire an individual, and consists otherwise of discrimination against an individual with respect to her compensation, terms, conditions, and privileges of employment because of the individual's race, color and sex, in violation of 42 U.S.C. 2000e-2(a)(1)."

The relief prayed by plaintiff is "for a permanent injunction against defendants, mandating that they appoint plaintiff to the position of Director of Social Services of Bladen County"; "back pay as Director of Social Services. . . from the date of her application to the date on which injunctive relief is granted"; reasonable attorney's fees; and costs.

Exhaustion of her administrative remedies to the extent required by 42 U.S.C. § 2000e-5(f)(1) is alleged by the plaintiff and denied by defendants. As an academic matter the position of the defendants would appear to be correct. Moreover, while the Civil Rights Act of 1964 was amended by Public Law 92-261, § 2(1), effective March 24, 1972, to include governmental agencies within the term "person", it is undisputed that at the time of the institution of this action the defendants did not have in their employment as many as twenty-five employees necessary to make applicable the provisions of the 1964 Act. Its provisions, therefore, are not available to the plaintiff in this action. At the same time, the plaintiff is not bound by the administrative remedies provisions of the 1964 Act nor its limitations with respect to the number of employees necessary to invoke its provisions. By basing her action also on the Civil Rights Act of 1866, 42 U.S.C. § 1981, plaintiff is entitled

to the identical relief available under the 1964 Act without the burdens of its administrative remedies provisions and other impediments. Brown v. Gaston County Dyeing Machine Company, 457 F.2d 1377, 1386 (4th Cir. 1972). Indeed it has been held that a Section 1981 plaintiff may deliberately by-pass the provisions of Title VII of the Civil Rights Act of 1964. Caldwell v. National Brewing Company, 443 F.2d 1044 (5th Cir. 1971); Young v. International Telephone Company, 438 F.2d 757 (3rd Cir. 1971).

But the fact that plaintiff's action has been properly laid under Section 1981 does not insure plaintiff's right to prevail at this time under the facts alleged in her complaint. In demanding that she be appointed as Director of Social Services plaintiff seeks to become defendants' chief executive officer - the person through whom defendants must implement their policies and discharge their own statutory duties. To say that they must appoint the first Negro to apply for the position, although professionally qualified, or risk a suit for damages such as this one strikes the court as a reductio ad absurdum in civil rights litigation.

Defendants have alleged in their answer that

> "The Bladen County Social Services Board has the discretionary

right to select the best available qualified person for the job of Director of Social Services. Plaintiff because she is female and a Negro, and if she meets the minimum requirements of the merit system rules of the State Personnel Board, has no absolute right to public employment as Director of Social Services of Bladen County. For the court to appoint the plaintiff to this position at the plaintiff's request would constitute a gross infringement of federal state relations and separation of powers."

This court agrees. Plaintiff has cited no similar case in which the requested relief has been granted, and the court has found none.

If plaintiff is not entitled to immediate appointment as Director of Social Services, a fortiori she is not entitled to back pay for a position not yet filled. At best plaintiff's action has been prematurely instituted and it must be dismissed. An order will be entered accordingly.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

May 11, 1973.



SUPREME COURT

JUL 18 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1916

DELILAH B. BLANKS,
Petitioner

vs.

WILBUR REGISTER, CHAIRMAN OF THE BLADEN COUNTY SOCIAL SERVICES BOARD AND GRADY PETERSON, GEORGE RESSEGUIE, MICHAEL R. SIMMONS, and CARL SUGGS, MEMBERS OF THE BLADEN COUNTY SOCIAL SERVICES BOARD,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Table of Citations 2

Question Presented 5

Statutory Provisions Involved 6

Statement of Case 11

Argument

I. The Respondents' Motion to Dismiss pursuant to Rule 12(b) with supporting Affidavits was properly treated by the District Court as a Motion for Summary Judgment and Petitioner's lawsuit properly dismissed and Summary Judgment granted in favor of Respondents 15

II. The Respondents have the right and duty under North Carolina law to appoint the most qualified applicant to the position of Director of Social Services of Bladen County, and by doing so do not violate the provisions of 42 U.S.C. Section 1983 or any other federal law or regulation 23

Conclusion 32

TABLE OF CITATIONS

CASES — PAGE

Adickes v. Kress and Co., 398 U. S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) 18

Bradford v. School District No. 20, Charleston, South Carolina, 364 F. 2d 185 (4th Cir. 1966) 16, 19

Buck v. United States, 466 F. 2d 481 (6th Cir. 1972) 25

Burks v. Perk, 470 F. 2d 163 (6th Cir. 1972) 28

Cafeteria Workers v. MacElroy, 367 U. S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961) 25

Gillentiene v. McKeand, 426 F. 2d 717 (1st Cir. 1970) 16

Greene v. Board of Regents of Texas Tech University, 335 F. Supp. 249 (N. D. Texas 1971) 30

Griggs v. Duke Power Company, 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) 27

Hodgin v. Noland, 435 F. 2d 859 (4th Cir. 1970) 25

Hore v. Trinter, 444 F. 2d 128 (6th Cir. 1971) 25

Johnson v. Branch, 364 F. 2d 177 (4th Cir. 1966) 25

Koch v. Zuieback, 194 F. Supp. 651 (S.D. Calif. 1961), aff'd. 316 F. 2d 1 (9th Cir. 1961) 17

Lewis v. Chicago State College, 299 F. Supp. 1359 (N.D. Ill. 1969) 29

McDonnell-Douglas Corporation v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) 24

Morgan v. Sylvester, 125 F. Supp. 380, aff'd. 220 F. 2d 758 (2d Cir.), cert. denied 350 U. S. 867, 76 S. Ct. 112, 110 L. Ed. 768, reh. denied 350 U. S. 919, 76 S. Ct. 201, 100 L. Ed. 805 (1954) 20

Oppenheimer v. Stillwell, 132 F. Supp. 761 (S.D. Calif. 1955) 16

TABLE OF CITATIONS (Cont'd.)

PAGE

Potrero Hill Community Action Committee v. The Housing Authority of the City and County of San Francisco, 410 F. 2d 974 (9th Cir. 1969) 16

United States v. Hayes International Corporation, 456 F. 2d 112 (5th Cir. 1972) 28

STATUTES

42 U.S.C., Section 1983 6

28 U.S.C., Rule 12(b) 6

Local Rule 7E of the United States District Court for the Eastern District of North Carolina 10

N.C.G.S. 108-15 ..... 8, 29

N.C.G.S. 108-17(a) 9, 26

N.C.G.S. 108-19 ..... 9, 29

REGULATIONS

Standards for Personnel Administration for Positions Under the Competitive Service 6

Article IV, Section 1 6

Article VI, Section 1 7

Article VI, Section 6 7

IN THE

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OCTOBER TERM, 1974

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DELILAH B. BLANKS,
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vs.

WILBUR REGISTER, CHAIRMAN OF THE BLADEN COUNTY SOCIAL SERVICES BOARD AND GRADY PETERSON, GEORGE RESSEGUIE, MICHAEL R. SIMMONS, and CARL SUGGS, MEMBERS OF THE BLADEN COUNTY SOCIAL SERVICES BOARD,
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

The Respondents, Wilbur Register, Grady Peterson, George Resseguie, Michael R. Simmons and Carl Suggs, being all of the members of the Bladen County Board of Social Services, pray that this Court deny the Writ of the Petitioner, Delilah B. Blanks, for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 26, 1974, affirming the judgment of the United States District Court for the Eastern District of North Carolina.

QUESTION PRESENTED

Does a public employer have the obligation to appoint an unqualified applicant to an executive position because that applicant is a female and a member of the Negro race in disregard of the qualifications of all other applicants?

STATUTORY PROVISIONS INVOLVED

28 U.S.C., RULE 12(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

If, on a Motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the Motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

42 U.S.C. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STANDARDS FOR PERSONNEL ADMINISTRATION FOR POSITIONS UNDER THE COMPETITIVE SERVICE

ARTICLE IV. REGISTERS

Secion 1. Establishment of Registers

After each examination, the Director shall prepare registers of persons with passing grades on a local and State basis as required for use by the agency or agencies for whom the registers are established. He shall also prepare a promotional register which shall include the names of all employees successfully passing the examination, provided the examination

is for a position with higher entrance qualifications and/or salary than the position currently held. The names of such persons shall be placed on these registers in the order of their final ratings, starting with the highest. If two or more eligibles have final ratings which are identical, their names shall be arranged on the register in the order of their ratings on the written part of the examination, or if the ratings on the written part of the examination are identical, in order of receipt of application. A register for a class of position identical in the agencies shall be used in making appointments to any agency.

ARTICLE VI. APPOINTMENTS

Section 1. Original Appointments

All appointments to positions in these agencies exclusive of exempt positions shall be made in accordance with these standards.

Selection shall be made for each position from the five highest available names on the register, submitted by the Director in accordance with Article V, exclusive of the names of those persons who failed to answer or who declined appointment or of those names to whom the appointing authority offers an objection in writing based on Article III, Section 4, which objection is sustained by the Director with the approval of the Board.

Section 6. Temporary Appointments

If an employee is needed for a temporary period, a certification shall be made by the Director of the names of those eligibles, in the order of their places on an appropriate regisister, who have indicated willingness to accept temporary employment. Certification shall be made in the manner as prescribed for probationary appointments. The duration of a temporary appointment shall be limited to the period of the

need and in no event shall a temporary appointment continue for more than 9 months in any twelve-month period. The acceptance or refusal of a temporary appointment shall not affect an eligible's standing on a register or his eligibility for a probationary appointment, and the period of temporary service shall constitute a part of a probationary period, in cases where it is found that the temporary employee may be continued in a regular budgeted position. In such cases, the temporary employee must be reached on the register for a probationary appointment. Successive temporary appointments to the same position shall not be made nor shall an employee receive successive temporary appointments.

N.C.G.S. SECTION 108-15

Duties and responsibilities.—The county board of social services shall have the following duties and responsibilities:

(1) To select the county director of social services according to the merit system rules of the State Personnel Board.

(2) To advise county and municipal authorities in developing policies and plans to improve the social conditions of the community.

(3) To consult with the director of social services about problems relating to his office, and to assist him in planning budgets for the county department of social services.

(4) To transmit or present the budgets of the county department of social services for public assistance and administration to the board of county commissioners.

(5) To have such other duties and responsibilities as the General Assembly or the Social Services Commission or the board of county commissioners may assign to it.

N.C.G.S. SECTION 108-17(a)

Appointment.—The Board of Social Services of every county shall appoint a Director of Social Services in accordance with the Merit System Rules of the State Personnel Board.

N.C.G.S. SECTION 108-19

Duties and responsibilities.—The director of social services shall have the following duties and responsibilities:

(1) To serve as executive officer of the board of social services and act as its secretary.

(2) To appoint necessary personnel of the county department of social services in accordance with the merit system rules of the State Personnel Board.

(3) To administer the programs of public assistance established by this Chapter.

(4) To administer funds provided by the board of commissioners for the care of indigent persons in the county under policies approved by the county board of social services.

(5) To act as agent of the Social Services Commission in relation to work required by the Social Services Commission in the county.

(6) To investigate cases for adoption and to supervise adoptive placements.

(7) To issue employment certificates to children under the regulations of the State Department of Labor.

(8) To serve as chief probation officer for judges exercising juvenile jurisdiction in the county if the court does not have personnel available to provide juvenile probation services.

(9) To supervise children conditionally released from State institutions for juvenile delinquents where courts exercising juvenile jurisdiction do not have personnel for this purpose.

(10) To supervise boarding homes, rest homes and convalescent homes for aged or infirm persons, under the rules and regulations of the Social Services Commission.

(11) To investigate, prepare, and submit petitions for the sterilization of eligible county residents to the Eugenics Commission and to arrange for operations authorized by the said Commission.

(12) To assist and cooperate with the Board of Paroles and the Probation Commission and their representatives.

(13) To keep informed of the condition of persons discharged from hospitals for the mentally ill.

(14) To investigate reports of child abuse and neglect and to take appropriate action to protect such children pursuant to the Child Abuse Reporting Law, Article 8 of Chapter 110 of the General Statutes.

(15) To accept children for placement in foster homes and to supervise placements for so long as such children require foster home care.

LOCAL RULE 7E OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Completion of Discovery.

In all civil cases, except in patent, anti-trust, and trademark cases, all discovery from adverse parties shall be completed within four months after the case is at issue. In patent, anti-trust, and trade-mark cases, dis-

covery shall be completed within eight months after the case is at issue. For good cause shown, the physical or mental examination of a party, as provided for in Rule 35, Federal Rules of Civil Procedure, may be ordered at any time prior to trial.

STATEMENT OF THE CASE

The Petitioner was employed by the Bladen County Social Services Department on August 19, 1968. Subsequently, the Petitioner requested a leave of absence for educational purposes, and that request was granted by the Board and the Petitioner voluntarily left her employment on February 3, 1970 and returned on June 1, 1970. The Petitioner later requested another leave of absence for educational purposes, and that request was also granted by the Board; the Petitioner left her employment on July 1, 1971 and was due to and expected to return to work on June 5, 1972. However, the Petitioner never returned to work with the Bladen County Social Services Department.

In the meantime, the Director of Social Services of Bladen County resigned his position, effective February 29, 1972, and on February 8, 1972, the Respondents appointed Mrs. Julia Butler as Acting Director until a permanent Director could be appointed. Besides being the niece of one of the Board members, as pointed out by the Petitioner, Mrs. Butler was also the highest ranking employee of the Social Services Department in terms of grade and service. At the time the Director resigned and Mrs. Butler was appointed Acting Director, the Petitioner was attending classes at the Univeristy of North Carolina at Chapel Hill, North Carolina and did not have a Master's degree in Social Services as she alleges in her Petition or a rating under the State Merit System Rules, both of which are required by the North Carolina Civil Service

Regulations for an appointment as a Social Services Director. The Petitioner had no rating or qualification that would make her eligible to be appointed to that position, and was therefore not highly qualified as she alleges in her Petition. Mrs. Butler was temporarily appointed pursuant to Article VI, Section 6 of the Standards for Personnel Administration for Positions Under the Competitive Service.

On February 9, 1972, the day after Mrs. Butler was appointed Acting Director, the Petitioner wrote a letter to the Chairman of the Bladen County Social Services Board enclosing an application for the position of Director of Social Services. The Chairman notified the Petitioner that the Board would like to interview her as an applicant for the position, and the Petitioner was in fact interviewed by the Board. on May 22, 1972. The Board also interviewed other applicants for the position. The Respondents never advised the Petitioner that she was unsuitable for the position prior to the time the action was dismissed by the District Court.

Pursuant to her request for an education leave and pursuant to correspondence with the Acting Director, the Petitioner was to return to work with the Bladen County Department of Social Services on June 5, 1972. However, the Petitioner never returned to work, and by letter dated June 22, 1972, resigned her position with the Bladen County Department of Social Services effective June 26, 1972.

On November 14, 1972, the Petitioner filed this lawsuit, alleging that the Respondents had discriminated against her in violation of 42 U.S.C. Section 2000-e et seq. and 42 U.S.C. Section 1983, in failing to hire her for the position of Director of Social Services of Bladen County. In her Brief filed with the United States Court of Appeals for the Fourth Circuit, the Petitioner abandoned any alleged claim under 42 U.S.C. Section 2000-e et seq.

On December 5, 1972, the Respondents filed a Motion to Dismiss the Petitioner's lawsuit pursuant to Rule 12(b) (6) for failure of the Complaint to state a claim against the Respondents upon which any relief could be granted along with an Answer, and alleged that the Respondents were not a "person" or "employer" within the definition of 42 U.S.C. Section 2000-e; that the Petitioner failed to obtain the requisite "Notice of Right to Sue" from the EEOC; that the Respondents had not appointed anyone as permanent Director of Social Services; and that the Respondents had the right and duty under the pertinent North Carolina law and regulations to appoint the most qualified applicant for the position of Director of Social Services.

On March 14, 1973, the Petitioner filed a Response along with a supporting Brief, and on March 20, 1973, the Respondents filed a Brief in support of their Motion to Dismiss.

After due notice to all attorneys of record, and after the four month period for discovery under the local Rules of Practice for the Eastern District of North Carolina, Rule 7E, had expired, a hearing was held on April 9, 1973 before the Honorable Franklin T. Dupree, Jr. in Wilmington, North Carolina. Present at that hearing was Mr. Henry Patterson of the firm of Smith, Patterson, Follin & Curtis and David A. Nash and William L. Hill, II, of Hogue, Hill & Jones. Argument was heard at that time by all attorneys by the District Court Judge, and at that hearing the Petitioner was allowed to amend her Complaint to further invoke the jurisdiction of the Court pursuant to 42 U.S.C., Section 1981. It was pointed out at that hearing that the Respondents' Answer was verified in support of the Motion to Dismiss, and Respondents' attorney stated that he would also file affidavits in support of the Motion pursuant to Rule 12(b). (Transcript of Motion Hearing, Pp. 18-19).

On April 17, 1973, the Respondents filed an Affidavit in Support of their Motion to Dismiss. That motion was to dismiss the lawsuit for lack of jurisdiction under both 42 U.S.C. Section 2000e and 1983, and the affidavit filed on April 17, 1973 went to both of these points.

On May 11, 1973, the Respondents met with their attorneys in Wilmington, North Carolina to discuss the status of the lawsuit and to determine whether the Board should proceed to make an appointment of anyone as Permanent Director in the face of the pendency of this lawsuit before the District Court. Following this meeting, the members of the Board held a meeting on May 14, 1973 to appoint a Permanent Director. At this meeting the names of three persons were presented to the Board for consideration. The persons whose applications were considered included the former Director of Social Services for Bladen County, the Petitioner and Mr. Charles Prince, the present Director of Social Services for Bladen County. All three applicants were listed on the State Register and therefore eligible for appointment. Discussion ensued regarding the qualifications of all three applicants, and it was pointed out that the Petitioner had been given a rating of 80 by the State Board of Social Services, whereas Mr. Prince had been given a rating of 90 by the State Board. After a full discussion, Mr. Charles Prince was appointed Director by the Bladen County Social Services Board by a vote of 3 to 1. At this time, none of the Respondents knew that the Petitioner's action had been dismissed by the District Court.

By Order and Memorandum of Decision filed on May 14, 1973, the District Court dismissed the Petitioner's lawsuit pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, 28 U.S.C., Rule 12(b).

Contrary to the allegations made by the Petitioner and her attorney, there was never any agreement, tentative or other-

wise, to hire a white male as Director of Social Services, and no such charge was made in the Petitioner's Complaint.

Of all persons whose names appeared on the North Carolina State Register, the Petitioner had the lowest rating and clearly was not highly qualified as she alleges. The present Director of Social Services, Mr. Prince, was appointed to this position because of his superior rating (a rating of 90.00) and because he was more experienced in the field of social work than the Petitioner. The Petitioner has not, and cannot, allege that she is as qualified as the present Director.

ARGUMENT

I. THE RESPONDENTS' MOTION TO DISMISS PURSUANT TO RULE 12(b) WITH SUPPORTING AFFIDAVITS WAS PROPERLY TREATED BY THE DISTRICT COURT AS A MOTION FOR SUMMARY JUDGMENT AND PETITIONER'S LAWSUIT PROPERLY DISMISSED AND SUMMARY JUDGMENT GRANTED IN FAVOR OF RESPONDENTS.

In her Petition, the Petitioner states she assumed that the Court was considering the matter simply as a Rule 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted, and that she was not aware that the Court would treat the Motion as a Rule 56 Summary Judgment proceeding. However, the District Court Judge stated at the hearing on April 9, 1973 that he would treat the Motion as a Rule 56 Summary Judgment proceeding. At that time, the Respondents' attorney stated that he would submit an affidavit in support of his motion. Consequently, the Respondents filed an affidavit in support of their contentions with the District Court on April 17, 1973, approximately one month before the Court rendered its decision, and at no time between

these two dates did the Petitioner file a counter-affidavit or give the Court any reason to think that the motion should be treated as anything but a Motion for Summary Judgment pursuant to Rule 12(b). The Rule plainly states that "if, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for Summary Judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56". The Respondents respectfully submit that the Petitioner took no steps between the 17th of April 1973 and the 14th of May 1973 to file any affidavits or other outside materials in support of her position, and that she cannot now complain of any lack of opportunity to file these materials. The law is clear that where a defendant has filed an affidavit in support of a motion to dismiss, an order granting the motion is to be treated on appeal as one granting a motion for summary judgment. *Potrero Hill Community Action Committee v. The Housing Authority of the City and County of San Francisco,* 410 F. 2d 974 (9th Cir. 1969); *Gillentiene v. McKeand,* 426 F. 2d 717 (1st Cir. 1970).

The Fourth Circuit has held that where the Court has before it a complaint and the defendants' motion for dismissal for failure to state a cause of action, the Court may properly treat the motion as one for Summary Judgment under Rule 12(b). *Bradford v. School District No. 20, Charleston, South Carolina,* 364 F. 2d 185 (4th Cir. 1966). In *Bradford,* the Court upheld the decision of the District Court granting summary judgment for the defendants noting that the plaintiff had made no attempts to support his allegations with affidavits or depositions. Also see *Oppenheimer v. Stillwell,* 132 F.

Supp. 761 (S.D.Calif. 1955) and *Koch v. Zuieback,* 194 F. Supp. 651 (S.D. Calif. 1961), aff'd. 316 F. 2d 1 (9th Cir. 1961).

Rule 12(b) is clear that where material outside the pleading is presented to the Court and not rejected by the Court, the motion shall be treated as one for summary judgment. The Petitioner had adequate time to file affidavits in support of her position, and having failed to do so should not be allowed to now contend that she did not have the opportunity to present such material to the Court.

The Petitioner in her Brief attaches two affidavits. The first affidavit, that of the Petitioner herself, states that it was her "understanding" on the basis of "reliable information received by me" that the Respondents made a tentative agreement for the employment of Mr. Prince as Director of Social Services sometime during the winter of 1972-73. These affidavits were incompetent as being second and third person hearsay based on "reliable information". However, the Respondents attached the affidavit of Mr. Prince to show beyond question that Mr. Prince was not hired tentatively or otherwise by the Respondents until after the date the District Court filed its decision in this matter.

The second affidavit appended by the Petitioner to her Brief was that of Norman B. Smith, the attorney for the Petitioner. The Respondents requested the Court to disregard an affidavit based on third person hearsay. Nevertheless, the Respondents attached to their Brief the affidavit of Mr. Rufus Britt, District Court Magistrate in the General Court of Justice of Bladen County, North Carolina which stated that Mr. Britt simply never made such a statement to the Petitioner's attorney, and that Mr. Wilbur Register, the Chairman of the Bladen County Social Services Board never made

the statement alleged to have been made by him in the Petitioner's attorney's affidavit.

The Petitioner's Brief before this Court makes reference for the first time to "tentative offers" made to a Mr. Davis. The Petitioner, it would seem, is attempting to manufacture facts as this lawsuit progresses. None of these allegations were placed before the District Court or the Court of Appeals, nor were any affidavits or other materials to this effect placed before the Court nor any discovery directed to such allegations.

The Petitioner further states in her Brief that had she been given the opportunity to present materials outside the pleadings in the District Court to rebut the Respondents' Motion to Dismiss, the two affidavits attached to her Brief would have been presented. The Respondents respectfully submit that had these affidavits been presented to the District Court, they would have been properly rejected by the Court as being incompetent and having no probative value whatever since the affidavits were based wholly on third person hearsay. The Petitioner did not conduct any pretrial discovery prior to the date of the hearing in the District Court in an effort to support her allegations and rebut the Respondents' Motion to Dismiss, but chose to rely only on incompetent hearsay affidavits based on "reliable information".

The Petitioner cites the case *Adickes v. Kress and Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) in support of her contention that summary judgment in favor of the Respondents was improper. The Respondents respectfully submit that the *Adikes* case does not aid the Petitioner and that the decision of the United States Court of Appeals for the Fourth Circuit is in accord with this Court's decision in *Adickes*. In the *Adickes* case, the plaintiff submitted an affidavit, not based upon hearsay, in support of her

position disputing the defendant Store Manager's assertion that the situation in the store at the time of the refusal to serve the plaintiff was "explosive". Also, the defendants in that lawsuit had failed to submit affidavits of two policemen that the plaintiff intended to call as hostile witnesses at the time of trial in order to prove her assertion that the two police officers were present in the store at all times alleged in the plaintiff's Complaint, thereby involving the State in the alleged conspiracy to deprive the plaintiff of her civil rights. In the present lawsuit, the two affidavits submitted by the Petitioner were pure hearsay, unlike the affidavits of the plaintiff in *Adickes* which were based on personal knowledge. In order to prove that there was no issue as to any material fact, the Respondents submitted the affidavits of the persons that the Petitioner alleged made the "discriminatory" statements. In those affidavits, the Respondent's proposed witnesses denied that the alleged statements had ever been made by them or to them. The admonition of this Court in *Adickes v. Kress and Co.* should have been heeded by the Petitioner:

> "If Respondents had met its initial burden by, for example, submitting affidavits from the policemen denying their presence in the store at the time in question, Rule 56(e) would then have required Petitioner to have done more than simply rely on the contrary allegation in her Complaint. To have avoided conceding this fact for purposes of summary judgment, Petitioner would have had to come forward with either (1) the affidavit of someone who saw the policemen in the store or (2) an affidavit under Rule 56(f) explaining why at that time it was impractical to do so . . . As one commentator has said:
>
> 'It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit.'" (At P. 156).

The Respondents respectfully submit that no substantial issue as to any material fact was placed before the District Court at any time prior to the decision filed on May 14, 1973. The Petitioner has attempted by innuendoes and accusations, without any supporting competent affidavits or other materials, to charge the defendants with a violation of the Civil Rights Act, 42 U.S.C. 1983, and has failed to place before the Court even a scintilla of evidence to support her allegations. On the other hand, the Respondents have met every burden in demonstrating the undisputed facts. There remains no substantial issue as to any material fact.

The present lawsuit comes squarely within the holding of *Morgan v. Sylvester*, 125 F. Supp. 380, Aff'd. 220 F. 2d 758 (2d Cir.), cert. denied 350 U.S. 867, 76 S. Ct. 112, 110 L. Ed. 768, reh. denied 350 U.S. 919, 76 S. Ct. 201, 100 L. Ed. 805 (1954). In the *Morgan* case the plaintiff instituted a lawsuit pursuant to 42 U. S. C. Sections 1983 and 1985 against various officials of the State of New York to recover damages for an alleged conspiracy to obstruct justice with the intent of depriving the plaintiff of her constitutional rights in connection with her prosecution of a claim against the State for alleged unlawful detention in a State hospital. The defendants moved for judgment on the pleadings, or in the alternative for summary judgment, and the Motion for Summary Judgment was granted by the Court. The Court held in *Morgan* that the fact that a complaint is grounded in conspiracy does not preclude the granting of a motion for summary judgment, nor does the fact that the complaint and the allegations thereunder are to be construed liberally bar such a motion. In granting defendants' Motion for Summary Judgment, the Court stated:

"A party moving for summary judgment bears the burden of showing the absence of any genuine issue of fact

requiring a trial. Thereupon, the opposing party must offer countervailing evidence that such an issue does exist—and, of course, if it is present the Court may not grant summary judgment. However, Rule 56 of the Federal Rules of Civil Procedure has not been rendered so sterile that a trial must be granted upon a claim which the papers show has no basis in fact. 'The Rule should not be used by the Court for the trial of disputed questions of fact upon affidavits, but when it is invoked by either party to a case and a showing is made by the movant, the burden rests on the opposite party to show that he has a plausible ground for the maintenance of the cause of action alleged in his Complaint, or if a defendant, if he has a ground of defense fairly arguable and of a substantial character.'

"Fully recognizing that conspiracies are rarely proved by direct evidence, nonetheless *some evidence, however slight, must be offered of a fact from which a reasonably minded person can draw an inference of the alleged conspiracy.* Here, not a scintilla of admissible proof has been submitted by plaintiff to controvert the defendant's affidavits. *Rule 56(e) specifically states that 'affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein'. The absence of facts is not cured by vituperation and the indiscriminate use of opprobrious adjectives. Neither is it cured by mere assertions unaccompanied by facts which would be inadmissible in evidence upon a trial.*

"The test for determining whether summary judgment should be granted is whether at the close of the trial the Judge could properly grant a Motion for a Directed Verdict. *If plaintiff took the stand upon a trial and attempted*

to repeat the statements in her affidavit and complaint, it is all too clear they would be inadmissible and the Court would be required to grant a non-suit.

"But the plaintiff insists she is entitled to cross-examine the defendants upon a trial since an issue of credibility is raised by their denial of her charges. She argues that a trier of the fact observing their demeanor may, despite their denials, conclude that 'the truth is the opposite of (their) story'.

"Thus, plaintiff in a typical statement challenges the appellate division justices to answer in open Court 'as to how, despite the overwhelming preponderance of evidence before them, they could arrive at their decision unless they were part of the conspiracy to defeat justice'. All the other defendants similarly are challenged to justify their actions. *However, a trial is required only when there are genuine issues of fact and 'the opposing party is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit movants evidence; he must, at the hearing, be able to point out to the Court something indicating the existence of a triable issue of material fact'.*

"In the absence of such an issue, defendants are not required to undergo the expense and vexation of a trial. Of course, every denial in a pleading raises a formal issue—but it does not necessarily raise a genuine issue of fact. '(Formalism) is not a substitute for the necessity of a real or genuine issue.' Rule 56 is intended precisely to permit 'a party to pierce the allegations of fact in the pleadings * * * where facts set forth in detail in affidavits, depositions, admissions on file, and other competent extraneous material show that there are no genuine issues of fact to be tried'.

"If a mere denial in a pleading, repeated in an affidavit

unsupported by any proof, were sufficient to require the credibility of the opposing party to be determined upon a trial, it would make a shambles of Rule 56." (At Pp. 388-390, Emphasis Added).

The Petitioner, Mrs. Blanks, has never rebutted the Respondents' motions and supporting affidavits and materials with competent evidence. The only evidence that the Petitioner has ever produced has been totally incompetent hearsay evidence that would not be admissible at the trial and would require the granting of a motion on the part of the Respondents for a non-suit at the close of the Petitioner's evidence. The Petitioner, in her affidavits, has merely reiterated the allegations contained in her Complaint without supplying any facts to support those allegations. As the Court said in the *Morgan* case, the absence of facts is not cured by vituperation and the indiscriminate use of opprobrious adjectives. Neither is it cured by mere assertions unaccompanied by facts which would be admissible in evidence upon a trial.

The Respondents respectfully submit that the District Court properly dismissed the Petitioner's lawsuit and granted summary judgment in favor of the Respondents, and that the United States Court of Appeals for the Fourth Circuit properly affirmed the summary judgment in accordance with this Court's prior decisions.

II. THE RESPONDENTS HAVE THE RIGHT AND DUTY UNDER NORTH CAROLINA LAW TO APPOINT THE MOST QUALIFIED APPLICANT TO THE POSITION OF DIRECTOR OF SOCIAL SERVICES OF BLADEN COUNTY, AND BY DOING SO DO NOT VIOLATE THE PROVISIONS OF 42 U.S.C. SECTION 1983 OR ANY OTHER FEDERAL LAW OR REGULATION.

The Respondents have followed each and every applicable

law and regulation in choosing a new Director of Social Services in Bladen County, and have hired the most qualified applicant for the position.

The Petitioner has cited the case of *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). That case states that in order to establish a prima facie case of racial discrimination a plaintiff must show "(1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that after his rejection the position remained open and the employer continued to seek applicants from persons of complainants qualifications." As the affidavit filed by the Respondents on April 17, 1973 clearly indicates, the Board interviewed Mrs. Blanks and at the time was still considering her for the position along with a number of other applicants. The Petitioner has never presented to the Court any notice of rejection received from the Respondents. In fact, the Petitioner herself admits that the Respondents interviewed several other persons for the position and that these persons were turned down. All persons who were no longer considered were sent letters stating that they would no longer be considered for the position. The Petitioner was never prior to the date of the District Court's decision turned down as an applicant for the position. Thus, the Petitioner completely failed to show elements (3) and (4), that is, that despite her qualifications she was rejected by the Respondents.

The Petitioner misconstrues the ruling of the District Court when she states that the Court held that the Respondents "are free to deny her employment on the basis of her race". The Court's holding was simply that the Petitioner did have an absolute right to the position because she was the first

Negro applicant possessing the minimum qualifications. The Court states in its Opinion that it agreed with the Respondents that:

> " 'Plantiff because she is female and a Negro, and if she meets the minimum requirements of the Merit System Rules of the State Personnel Board, has no absolute right to public employment as Director of Social Services of Bladen County. For the Court to appoint the plaintiff to this position at the plaintiff's request would constitute a gross infringement of Federal-State relations and separation of powers.' "

The Respondents submit that the Bladen County Social Services Board had the duty to select the best available qualified person for the job of Director of Social Services, and that Petitioner, because she is a female and a Negro, and if she meets the minimum requirements of the Merit System Rules of the State Personnel Board, has no absolute right to an appointment as Director. *Cafeteria Workers vs. MacElroy*, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961); *Hodgin v. Noland*, 435 F. 2d 859 (4th Cir. 1970); *Buck vs. United States*, 466 F. 2d 481 (6th Cir. 1972); *Burks v. Perk*, 470 F. 2d 163 (6th Cir. 1972); *Hore v. Trinter*, 444 F. 2d 128 (6th Cir. 1971); *Johnson v. Branch*, 364 F. 2d 177 (4th Cir. 1966).

In her Complaint, the Petitioner states that the Board has the duty and responsibility "to select the County Director of Social Services according to the Merit System Rules of the State Personnel Board". The Respondents agree with this, and submit that this is what they have done.

At the time that Mrs. Julie Butler was appointed as temporary Director, the Petitioner did not meet the qualifications for the position of permanent Director. On February 2, 1972, Ronald Huffman resigned his position as Director of

the Bladen County Social Services Department, effective February 29, 1972. On February 8, 1972, the Board of Social Services appointed Mrs. Julia Butler as temporary Director pursuant to Section 6 of Article VI of the State Merit System Rules by a unanimous vote of its members. At this time the Petitioner did not have a Masters Degree, had not taken the State examination and her name did not appear on the State Register. To have appointed her would have been a gross violation of the State Merit System Rules.

N.C.G.S. Section 108-17(a) provides that:

"The Board of Social Services of every county shall appoint a Director of Social Services in accordance with the Merit System Rules of the State Personnel Board."

Article VI, "Appointments", Section 1, of the Standards for Personnel Administration for Positions under the Competitive Service provides that:

"All appointments to positions in these agencies, exclusive of exempt positions, shall be made in accordance with these standards. *Selections shall be made for each position from the five highest available names on the register*, submitted by the Director in accordance with Article X, exclusive of the names of those persons who failed to answer or who declined appointment or of those names to whom the appointing authority offers an objection in writing based on Article III, Section 4, which objection is sustained by the Director with the approval of the Board." (Emphasis Added).

Of all the applicants appearing on the State Register, Mrs. Blanks' rating was the lowest. Mrs. Blanks received a rating of 80, while the next lowest rating was a 90. According to Section 1 of Article VI of the Standards for Personnel Administration for Positions Under the Competitive Service,

the Board has the right and the duty to select the most qualified person as Director of Social Services.

The Respondents respectfully submit that the Petitioner has no right to be appointed to the position of Director of Social Services of Bladen County unless she is the most qualified person desiring the appointment and in the judgment of the members of the Board would be the best person to serve in this position. Surely 42 U.S.C. Sections 1981 and 1983, as well as 42 U.S.C. Section 2000e-2, were not intended to accord privileges to the Petitioner in blind disregard of the rights and qualifications of other applicants and in disregard of applicable impartial State regulations and the interest of the Bladen County Board of Social Services in efficiency and ability.

As noted in the District Court's Opinion, in demanding that she be appointed as Director of Social Services, the Petitioner seeks 'to become the Appellees' chief executive officer, the person through whom the defendants must implement their policies and discharge their own statutory duties'. The Respondents are unable to find any cases requiring a State Agency to appoint someone to an executive position in the face of the right of that body to choose the person who is most qualified. The statement of this Court in *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) is equally applicable to the present situation:

> ". . . Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority is precisely what Congress has proscribed."

In *United States v. Hayes International Corporation*, 456 F. 2d (5th Cir. 1972), the Court stated:

> "We emphasize that Hayes is not required to transfer an incumbant Negro to a job he is not competent to perform or not entitled to if there are other more senior qualified employees."

It would seem to the Respondents that if the Petitioner has any remedy, that remedy would be to seek mandamus in the Courts of the State of North Carolina to compel her appointment if she honestly believes that Respondents have not adhered to the laws and the Merit System Rules of the State Personnel Board of North Carolina. Otherwise, the Petitioner must attack the State Merit System, since the Respondents have fully complied with the rules of that system. To allow the Petitioner to proceed in this action would constitute an infringement of the powers of the Executive Branch of Government of the State of North Carolina in that the Court would, in effect, be replacing the judgment of the Bladen County Social Services Board with its own judgment. As the Court stated in *Burks v. Perk*, Supra:

> "Federal Courts ought not intrude in controversies between State Political Subdivisions and their officers, over the title to a state office or the rights of persons appointed to such office. We ought not strain unnecessarily the relationship between Federal-State Judicial Systems." (P. 165, Emphasis Added).

The Court held in *Burks v. Perk* that Civil Service Commissioners who were sought to be removed from office by the mayor should resort first to State Judicial remedies for review, and that they should not frustrate the State procedures by going immediately to Federal Court.

The Petitioner alleges in her Brief that the County Director of Social Services is not an appointee on the policy mak-

ing level and is without authority to formulate policies, make regulations or set up standards. The Respondents disagree. As the District Court stated in its Opinion, "in demanding that she be appointed as Director of Social Services plaintiff seeks to become defendant's chief executive officer—the person through whom defendants must implement their policies and discharge their own statutory duties". N.C.G.S. Section 108-19 states that the Director of Social Services is to serve as Executive Officer of the Board of Social Services and act as its Secretary and to appoint necessary personnel to the County Department of Social Services, administer the programs of public assistance and administer funds provided by the Board of Commissioners for the care of indigent persons in the County under policies approved by the County Board of Social Services. N.C.G.S. Section 108-15 states that the Members of the County Board must consult with the Director of Social Services about problems relating to that office and work with the Director planning budgets for the County Department of Social Services. Since it is very important for the Director and the Board to work together in formulating policies and planning budgets for the County Department of Social Services, it is very important that the Board be allowed to exercise the discretion granted it by the Merit System Rules of the State Personnel Board in selecting the most qualified person as Director.

In *Lewis v. Chicago State College*, 299 F. Supp. 1357 (N.D. Ill., 1969) the plaintiff was a Negro associate professor at a public college in Chicago. The Department of Business Education at the college had recommended that the plaintiff be promoted to a full professor, but the administration declined to do so. The plaintiff instituted an action pursuant to 42 U.S.C., Sections 1983 and 1985 claiming discrimination in the failure of the college to make him a full professor.

The members of the committee all filed affidavits stating that their failure to make the plaintiff a full professor was unrelated to his race, that race was never mentioned, and that the plaintiff simply failed to meet the Committee's criteria for promotion to full professor. The Court granted summary judgment in favor of the defendant college, noting that a professor's value depends upon many standards and that the Judiciary is not the proper place to decide such questions. Speaking on this point, the Court stated:

> "Moreover, promotion decisions made by college faculty, administration, and governing boards are not normally justiciable. These determinations depend upon evaluations of intangibles such as scholarship, teaching ability, service to the profession and potential contribution to the institution. A full professorship may not be obtained solely by long tenure, good behavior or the accumulation of academic degrees. Instead, it is the highest honor a university can confer upon a colleague . . ." (At P. 360 of the Opinion).

The only real difference between the *Lewis* case and the present one, is that the Petitioner in this action is seeking to be appointed to the highest office of the Bladen County Social Services Department, rather than promoted to that position, and the Respondents submit that so long as they comply with the State Merit System Rules in appointing the Director, and appoint the most qualified applicant for the position, none of the rights of the Petitioner have been violated.

As the Court said in *Greene v. Board of Regents of Texas Tech. University,* 335 F. Supp. 249 (N.D. Texas 1971), a civil rights action by an Associate Professor seeking redress for grievances allegedly resulting from sex discrimination by University officials in failing to promote the plaintiff from an Associate Professor to a full Professor:

> "Texas Tech. University has established definite criteria

for evaluating a person's eligibility for promotion in teaching rank. The criteria for promotion to full Professor are especially exact, as that is the highest faculty status which can be awarded by a university. The Court finds that these criteria are reasonable, and that they bear a rational relationship to the duties of a full professor, and that they were reasonably applied in this case. They call for careful evaluation of (a) teaching ability, (b) publications and scholarly activity, and (c) service to the community and to the University. It is undisputed that such evaluations are necessarily judgmental, and the Court will not substitute its judgment for the rational and well considered judgment of those possessing expertise in the field." (At P. 250).

The Respondents respectfully submit that the State of North Carolina has established definite criteria for evaluating a person's eligibility for appointment to the office of County Director of Social Services, and has given each County Board the discretion to make the appointment of the most qualified person whose name appears on the State Register and the Respondents have followed the criteria and requirements of the State Merit System in its attempts to choose a permanent Director of Social Services of Bladen County, and that its failure to appoint the Petitioner as Director was in no way discriminatory and certainly not in retribution for the exercise of any Constitutionally protected right of the Petitioner as is the normal case in a suit brought under 42 U.S.C. Sections 1981 and 1983.

CONCLUSION

For the reasons stated above, the Respondents herein respectfully submit that the Petitioner's Petition for Writ of Certiorari should be denied.

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